SUPREME COURT OF FLORIDA

TERRY SMITH,
Appellant/Petitioner,

v.

STATE OF FLORIDA,
Appellee.

Case Nos. SC18-1763

MOTION FOR REHEARING

Terry Smith respectfully moves, pursuant to Fla. R. App. P. 9.330, for reconsideration of this Court's October 21, 2021 opinion in this case related to key facts and points of law that were overlooked or misconstrued. Specifically, Smith respectfully argues that this Court misapprehended the facts or law in its opinion on the following points raised in the pleadings, at the evidentiary hearing, and in the briefs filed in this cause:

Introduction of evidence of lack of remorse

At trial, lead trial counsel Richard Kuritz offered additional footage of the videotaped interrogation of Smith by Detectives Nelson and Chizik, over the objection of the State. The jury saw detectives berate Smith that he lacked remorse for the murders, accuse him of being guilty, and assert that he was lying. Here is a small sample of

the 26 instances where the detectives accused Smith of lacking remorse, evidence which was offered by Smith's own counsel:

> Detective Nelson: You better find somewhere in your heart to find some type of remorse, because, if not, the only way they - - the only thing that they can portray of you - - the only thing they can portray of you is a guy who cold bloodily killed - - executed three people.
>
> * * *
>
> Detective Nelson: Can you please show some remorse for the people you killed?
>
> * * *
>
> Detective Chizik: [Y]ou ain't showing no remorse for it.
>
> * * *
>
> Detective Nelson: [T]erry, would you like to let - - if somebody know that you're sorry for what you did? . . . Would you like someone to know that you - - you're sorry for taking these peoples' lives Terry?

(R16. 1229, 1248, 1272-73.)[1]

The State, the circuit court, and this Court approved Kuritz's "strategy" decision to offer this evidence to show how overbearing the detectives were. (Slip Op., at 9.)

[1] References to the trial record will be designated with an R followed by the volume number (R7. 433.) and page number. References to the post-conviction record will be PCR followed by the page number (PCR.2381.)

This Court did not address that Kuritz also offered additional excerpts of the videotaped interrogation in which the detectives confronted Smith with their beliefs that Smith was guilty and their theory of how the murders occurred. Here are two representative samples:

> Detective Nelson: Terry, you murdered three people in cold blood.
>
> * * *
>
> Detective Nelson: What did that unarmed – look – look right here. What did that unarmed young woman do to cause you to take her life, other than seeing you take somebody else's life? That was the only thing she was guilty of, standing there watching you take somebody else life [sic], so you did the – the next best thing for you, you took hers.

(R16. 1225.)

Evidence of lack of remorse was inadmissible against Smith to prove any of the elements of first-degree murder or armed robbery. *See Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1984) (Regarding presentation of evidence of the defendant's lack of remorse, this Court stated, "Events occurring after death, no matter how revealing of depravity and cruelty, are not relevant to the atrocity of the homicide."); *see also Robinson v. State*, 520 So.2d 1, 6 (Fla. 1988)

("Henceforth lack of remorse should have no place in the consideration of aggravating factors. . . ."). Here, the offer by Smith's own counsel of his lack of remorse bore no relevance to the elements of the crimes charged and should not have been admitted, especially by his own counsel.

Additionally, the offer of proof by trial counsel of the detectives' belief of Smith's guilt was also deficient conduct as that evidence was clearly inadmissible and likely would have resulted in a mistrial if it had been offered by the State. This Court has warned that opinion evidence of the defendant's guilt offered by law enforcement officers is inadmissible as it invades the province of the jury to decide the issue of guilt. *See Seibert v. State*, 923 So. 2d 460, 472 (Fla. 2006). Part of the danger of admitting a police officer's opinion of the defendant's guilt is that jurors are inclined to give great weight to the opinions of officers. *See Glendenning v. State*, 536 So. 2d 212, 221 (Fla. 1988) (Any probative value of the officer's opinion that the defendant is guilty "is clearly outweighed by the danger of unfair prejudice."); *Tumblin v. State*, 29 So.3d 1093, 1110 (Fla. 2010) ("Police officers, by virtue of their positions, rightfully bring their testimony an air of authority and legitimacy.").

Offers of a police officer's opinion that the defendant is guilty have been found by this Court to be harmful error that resulted in reversals. *See Sparkman v. State*, 902 So.2d 253, 2557-59 (Fla. 4th DCA 2005) (An officer's statements that he believed the defendant was guilty were not harmless error); *Pausch v. State*, 596 So.2d 1216, 1218-19 (Fla. 2d DCA 1992) (It was reversible error to publish to the jury a taped interrogation of the defendant in which a police officer accused the defendant of lying and predicted the defendant would eventually kill her child as the statements were misleading and fundamentally undermined the fairness of the defendant's trial.); *Jackson v. State*, 107 So.3d 328, 330 (Fla. 2012) (It was reversible error for the State to offer, over the defendant's objection, a videotaped interrogation of the defendant in which detectives repeatedly expressed their personal opinions that the defendant was guilty of first-degree murder.).

There was nothing about Kuritz's decision or strategy to offer harmful evidence against his client that was well-considered after a thorough investigation as required by *Strickland*. He could have successfully moved to exclude the references to lack of remorse offered by the State on direct examination of the lead detective,

impeached the detective with a written transcript for the number of times Smith asked to be returned to his cell, and, most importantly, not offered further evidence of the detectives' accusations that Smith lacked remorse and was guilty in their eyes.

Counsel's investigation of the videotaped interrogation started the week before trial, despite the fact that he could have obtained copies of the videotaped interrogations as early as November 30, 2009, the date of his appointment as conflict counsel, as the existence of the interrogation was disclosed by the State in its initial disclosure on May 13, 2009. (R1. 39, 14-16.) The State represented at a pretrial conference that it had sent trial counsel a transcript of the interrogations on February 14, 2011, two weeks before Smith's trial started. (R7.1257.) Kuritz tried the second-degree murder case of Dale Bariffe from February 14-17, 2011, and it appears from counsel's comments at Smith's last pretrial conference held on February 25, 2011, the Friday before jury selection started on Monday, February 28, 2011, that lead counsel had just started to review the interrogation videotapes:

> Kuritz: . . . [I]t dawned on me that all I kept hearing was the detectives talk about what a great case they had and that they were going to convict him in court and in my mind

> bolstering their position without offering any facts and my client wasn't responding. It was just them talking for an hour. I said [to the prosecutor], 'Look, you know I think I should do a motion in limine on this because all it is is them talking about the case and my client denying it.

(R7. 1322-23.)

Kuritz conducted no independent investigation or research on the issues but relied upon the prosecution's representation to him that the evidence was admissible. (R7: 1306, 1323.) When confronted at the evidentiary hearing about his decision to admit evidence of lack of remorse and the officers' opinion that Smith was guilty, counsel first offered that he thought he had filed a motion to exclude the evidence. (PCR: 2432-34.) He did not, and his failure to do so was clearly deficient conduct.

Evidence offered by trial counsel of Smith's lack of remorse and the detectives' opinions that Smith was guilty was extremely prejudicial to Smith and should not have been admitted by either side. There is a reasonable probability that the result would have been different had counsel prepared for trial and moved to exclude this damning evidence. This Court's comment that Smith did not make clear how this evidence harmed him when he argued at trial that he did not commit the murders misapprehends the impact of

this interrogation in which the detectives expressed repeatedly and in no uncertain terms that they believed Smith committed the murders and was remorseless. (Slip Op., at 9.) Offers of proof of a defendant's lack of remorse and law enforcement officers' opinions that the defendant was guilty are harmful errors that would have resulted in reversals by this Court had the State offered them. Moreover, counsel should have anticipated the case could go to a penalty phase if the jury found him guilty of the capital murders and that same jury, now charged with rendering a life or death verdict, would be deeply troubled by Smith's lack of remorse. The circuit court's findings and this Court's ruling affirming those findings that counsel's conduct was not deficient and was a reasonable strategy is not supported by competent, substantial evidence.

Stipulation to booking photos and statements written on them

This Court did not address whether it was deficient conduct by trial counsel to stipulate to the admission of three of Smith's booking photographs or mugshots and statements written on them admitted into evidence through State's witnesses Breon Williams, Ulysses Johnson, and Jonathan Peterson. (Slip Op., at 11.)

At the evidentiary hearing, Kuritz agreed that there was no identification issue when he was asked why he stipulated to the admission of his client's booking photographs. (PCR. 2421.) He justified his agreement to the admissibility of the mugshots and the written statements on them and testified that he does not object to evidence if it is coming in any way. (PCR. 2423.)

Clearly Kuritz did not conduct basic research on the admissibility of this evidence. Booking photographs or mugshots are inadmissible because they are evidence of the defendant's arrest for unrelated crimes. *See* Fla. Stat. §90.404(1) (2017); *Whitehead v. State,* 279 So. 2d 99 (Fla. 2d DCA 1973); *Houston v. State*, 360 So. 2d 468 (Fla. 3d DCA 1978); *D'Anna v. State*, 453 So. 2d 151 (Fla. 1st DCA 1984).

There was no issue of eyewitness identification in this case. Williams, Johnson, and Peterson had each known Smith for years. The mugshots were not needed to prove the identification of Smith; each man could have simply stated that he knew Smith well and identified him in the courtroom.

Additionally, the statements written by the witnesses on the booking photographs were hearsay as they were out-of-court

statements offered to prove the truth of the matter asserted. This Court has affirmed the findings of the circuit court that these were properly admitted as prior consistent statements under Fla. Stat. §90.801(2)(b) to rebut an inference that the statement was recently fabricated. (Slip Op., at 17.) Out-of-court statements are not admissible under this section if they are made after the motive to lie arose, however. *See Browne v. State*, 132 So. 3d 312, 317-18 (Fla. 4th DCA 2014) (statements made by sexual assault victim to a friend after defendant raised issue that victim was fabricating the assault were inadmissible); *see also Goldtrap v. State*, 115 So. 3d 1025, 1028 (Fla. 1st DCA 2013) (error to admit text messages from victim as prior consistent statements when the messages were sent after the motive to fabricate arose); *Carter v. State*, 115 So. 3d 1031, 1035 (Fla. 4th DCA 2013) (error to admit police officer's testimony of prior consistent statements by witnesses after their motive to fabricate or falsify had already arisen).

Here, each witness had a motive to lie from the outset and long before they were interviewed by law enforcement. Breon Williams had a motive to lie to avoid culpability the moment he left the house and sent Kirk Brewer back to pick up his scooter, days before he

spoke to his father, and a year and a half before he spoke to detectives. Ulysses Johnson and Jonathan Peterson had a motive to avoid any contact with the police from the night of the murders and to lie to protect Raylan Johnson, a close family member, who bragged to others that he committed the murders. Raylan Johnson is Ulysses Johnson's brother and Peterson's cousin.

This evidence was highly prejudicial as the witnesses testified to statements allegedly made to them by Smith, then were shown the mugshots and asked to read their written statements on them to the jury. The mugshots then went back to the jury for review during their deliberations. The mugshots were inadmissible because they pointed to Smith's arrests for at least three distinct crimes and the writings were hearsay. Had the mugshots and the statements written upon them been excluded, there is a reasonable probability of a different outcome. It is apparent that the State offered the mugshots and the written statements on them to bolster the testimony of these witnesses individually and collectively.

Trial counsel's stated strategy reason for not objecting to any of the three booking photographs and the written statements on them was that he did not want to waste time "or be obstructionist." (PCR:

2420.) Counsel's duty was to advocate, not appease. If nothing else, counsel had the duty to challenge the State's case and hold it to its high burden of proof of beyond a reasonable doubt. Conducting rudimentary research on the admissibility of mugshots and out-of-court written statements on those mugshots should have been done well in advance of trial and motions to exclude should have been filed and argued. Trial counsel had a duty to investigate the facts and the applicable law. *See Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland."*).

The circuit court's findings that counsel's conduct was not deficient and was a reasonable strategy is not supported by competent, substantial evidence.

Failure to investigate and challenge the forensic evidence

This Court upheld the circuit court's determination that it was a reasonable strategy decision for trial counsel not to investigate the forensic evidence in this case as Smith allegedly confessed to counsel and "[a] decision that lodging a particular challenge to the validity of

evidence would be a waste of resources in light of counsel's knowledge of corroborating facts [including defendant's confession] can be a reasonable decision." (Slip Op., at 20-21.) Even giving credence to trial counsel's claim that Smith confessed, which Smith denied at the evidentiary hearing, trial counsel testified that this occurred shortly before trial, which means that trial counsel had no reasonable excuse for not investigating the forensic evidence in the case in the 13 months prior to trial. (PCR. 2381.)

Any strategy rationale offered by lead counsel is suspect and not worthy of belief. The circuit court found that Smith was not credible but failed to consider the internal inconsistencies of lead counsel's testimony, the testimony of lead counsel's co-counsel and investigator that squarely refuted lead counsel's testimony, and lead counsel's testimony that he offered false defenses at the trial. The circuit court and this Court failed to address those arguments raised by Smith in his briefs.

When asked about his investigation of the crime scene, the autopsies, and the firearms evidence in Smith's case, trial counsel gave contradictory explanations. Regarding the crime scene and firearms evidence, lead counsel testified that he did not think the

female victim, Kennethia Keenan, could have been shot with the AK-47 found clutched in the hands of victim Berthum Gibson, who was found in the same small bedroom with Keenan. (PCR.2483.) This assertion was made in spite of lead counsel admitting he did not know much about guns. (PCR.2370.) Then he testified that he discussed the forensic issues with his investigator, Michael Hurst, who he described as a "firearms guy" with crime scene, firearms, and serious crimes investigation experience. (PCR. 2388-89.) Conversely, Hurst testified at the hearing that he had no special training in firearms or crime scene investigations in his former law enforcement experience, denied ever discussing that evidence with lead counsel, and denied that lead counsel ever asked him about that evidence. (PCR. 2428-30.)

After lead counsel testified that he discussed all the forensic evidence with his co-counsel and they agreed to challenge it wherever possible, co-counsel testified conversely that he would have done anything he could do to raise doubt about the firefight at the scene and would have pointed out "each piece of evidence that I thought was relevant to create reasonable doubt." (PCR.2406, 2729-37.)

Lead counsel also testified that he did not want to waste resources hiring experts on the forensic issues because his client confessed to him. (PCR.2377.) Smith testified at the evidentiary hearing and denied ever confessing to anything. (PCR.2805.) The circuit court and this Court overlooked that counsel testified that he first asked Smith about the murders in the weeks or days leading up to trial that started on February 28, 2011 while Kuritz was preparing for and then trying a second-degree murder case from February 14-17, 2011. Lead trial counsel did no investigation of the critical forensic evidence in the 13 months he was assigned to represent Smith in this triple-homicide capital case. He had an obligation to investigate this case from the first day of his involvement in the case but did nothing. Claiming that his client confessed to him on the eve of trial cannot absolve lead trial counsel of his solemn duty to investigate the case and this Court has overlooked that critical fact. Instead of weighing the internal and external inconsistencies of lead counsel's contradictory explanations for his failure to challenge the forensic evidence, the circuit found Smith not credible and this Court affirmed that finding.

Lead counsel's failure to investigate Smith's case is supported by record evidence that he forgot to retain the services of an investigator for more than three months after his appointment and did not move for appointment of second chair until ten months after his appointment and three months before trial. (R1.42, 44-45; PCR. 1161, 2348-49.)

The circuit court and this Court have either overlooked or ignored the incredulity of lead counsel's explanations.

Again, this Court should reconsider the record evidence that lead counsel did not investigate the forensic evidence because he said he did not need to, because he said he was educated by his investigator on it, or because he claimed his client confessed to him and therefore he had no duty to investigate it. All of those assertions were self-serving and directly refuted by the record.

Regarding why he did not challenge the testimony of Dr. Jesse Giles, the medical examiner who testified to the findings of two other pathologists who did not testify at trial, trial counsel stated he found Giles to be a difficult witness to handle and did not think he could get anything out of him. (PCR. 2842.) He did not take depositions of Giles or the other two medical examiners. He wrote to his co-counsel

the night before the State offered Dr. Giles and asked co-counsel to conduct the cross-examinations of the State's witnesses the next day as he was tired and needed a break. (PCR. 2483, 2370.)

Perhaps the greatest obligation of counsel representing a client on trial for his life is to prepare for trial. Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is perhaps the most critical stage of the lawyer's preparation. *See Magill v. Dugger*, 824 F. 2d 879, 886 (5th Cir. 2012). "A reasonable strategic decision is based on informed judgement." *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003). Also critical is the duty to consult and present expert testimony in cases in which the jury's interpretation of it is imperative. *See Williams v. Thaler*, 684 F. 3d 597, 604 (5th Cir. 2012) (Defense counsel's performance fell below an objective standard of reasonableness when counsel failed to obtain independent ballistics or firearms experts, and was therefore unable to offer any meaningful challenge to the findings and conclusions of the State's experts, many of which proved to be incorrect.); *State v. Fitzpatrick*, 118 So.3d 737, 753-59 (Fla. 2013) (Trial counsel's failure to properly investigate and challenge forensic evidence related to the timing of defendant's sexual

encounter with the murder victim in a capital murder case was deficient conduct under *Strickland* and the severity of the errors undermined the Court's confidence in the verdict.).

Here trial counsel made no independent investigation of the forensic evidence in this case. His claim that he did not have to investigate the evidence because of the eve of trial "confession" Smith made to him rings false given his other claims that were directly refuted by his investigator and his second chair. Had he retained the services of independent experts on the crime scene and forensic pathology issues that were apparent from a casual review of the crime scene photographs and autopsy findings, counsel could have raised a reasonable doubt as to what happened in that firefight and who killed the female victim. Failure to investigate the circumstances of the shooting and the autopsy findings until the eve of trial cannot excuse lead counsel's abject failure to prepare for this triple-homicide capital murder trial.

Failure to impeach critical witnesses and witnesses feared retaliation

In rejecting the argument that counsel provided ineffective assistance for missing multiple opportunities to impeach, this Court

cites to *Bates v. State*, 3 So. 3d 1091, 1106 n. 20 (Fla. 2009) for the proposition that counsel cannot be ineffective for what counsel actually did. (Slip Op., at 22.) In *Bates*, the defendant argued counsel was ineffective for failing to renew his motion for change of venue. In fact, counsel had renewed that motion and when that was rejected they had further requested individual voir dire to attempt to ameliorate the problem in a different way.

In Smith's case, had trial counsel seized every opportunity to impeach, perhaps this Court's analogy to *Bates* would be more fitting. While trial counsel may have commented on Williams' untruths to the police, he needed to impeach Williams with *all* available impeachment. Similarly, it was not enough to note inconsistencies with the other witnesses' statements. Kuritz should have utilized their criminal records as impeachment as well. Hernandez (co-counsel) testified that he would have impeached all state witnesses. (PCR: 2729-2750.) With Kuritz's stated strategy being to argue someone else did it while "throw[ing] credibility issues at everyone," it was ineffective to miss multiple opportunities to impeach the State's witnesses with their qualifying convictions, their inconsistent statements, and their vested interest in the case. (PCR: 15556-1608,

2411, 2490.) Further, the circuit court's findings do not rest on competent substantial evidence. These missed opportunities for impeachment cannot be attributed to strategy when trial counsel himself gave no strategy or even admitted that he could have done more. (PCR.2490.)

Failure to raise a Confrontation Clause challenge to the medical examiner's testimony

Dr. Jesse Giles was called to testify to the cause and manner of death of the three victims, Desmond Robinson, Kennethia Keenan, and Berthum Gibson. While Dr. Giles conducted the autopsy of Robinson, he did not conduct the autopsies of Keenan or Gibson. These were conducted by Dr. Arruza and Dr. Nicolaescu, respectively. Dr. Giles testified with no objection to the results of the other doctors' autopsies. Counsel declined to even cross-examine him.

In postconviction this Court rejected the appellant's argument under *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004). At the time of trial, however, the *Crawford* argument would have been a viable argument as *Brooks v. State*, 175 So. 3d 204, 237 (Fla. 2015) (the case cited by this Court) had not been decided. While this Court cites to earlier cases where in specific instances no error was found

where medical examiners testified to work they had not done, these would have been (and still are) inconsistent with *Crawford*. The law at the time was evolving with each new Confrontation Clause ruling issued by the Supreme Court. Trial counsel's excuse of not objecting to the testimony as he knew from the client how the shootings had occurred, once again, does not excuse him from failing to do any research on the issue or depose the medical examiners in the months leading up to trial. (PCR: 2381, 2401-02).

Failure to advance Smith's defense

Smith testified at the evidentiary hearing. He denied admitting his guilt to his trial counsel and denied committing the murders. (PCR.2805.) The circuit court found Smith's testimony not credible and this Court affirmed that finding. (Slip Op., at 37.) The circuit court and this Court failed to weigh the testimony and conduct of trial counsel for internal inconsistencies and against the testimony of other members of his team. Lead counsel offered conflicting excuses for why he did not investigate the forensic evidence in the case.

He said he did not know much about guns, but then said he did not need to investigate the forensics because he knew about guns. (PCR.2398, 2405.)

Kuritz said he relied upon the expertise of his investigator who had a lot of experience in the investigation of firearms and crime scenes to explain the crime scene evidence to him, but that testimony was directly refuted by the investigator, who denied any expertise in firearms and crime scenes and further stated that he did not discuss the evidence with lead counsel. (PCR. 2405, 2429-30.)

Kuritz said he had conferred with his co-counsel on how to attack the evidence in the case, but his co-counsel testified that he would have challenged everything he could to raise a reasonable doubt for Smith.

Kuritz said Smith confessed to him in the weeks or days before trial but, if that were true, and Smith testified it was not, then that cannot excuse lead counsel's failure to investigate the evidence from the date of his appointment, 13 months before the trial.

Kuritz also freely admitted presenting false defenses to the trial court and the jury instead of arguing reasonable doubt.

Despite all of these inconsistencies, Kuritz's credibility was never weighed by the circuit court or this Court.

Cumulative error

The errors set forth above and those argued in Smith's briefs should undermine any confidence this Court can have in the reliability of the outcome here. All errors and misapprehensions set forth above hinge on the circuit court's findings and this Court's affirmation that trial counsel's conduct was not deficient or was based upon reasonable strategy decisions. What the trial court and this Court have not considered is the lack of credibility of trial counsel whose testimony was rife with internal inconsistencies and was at odds with the testimony of his co-counsel and investigator. Most importantly, lead counsel freely admitted to offering false defenses to the trial court and jury, actions that could have resulted in Bar discipline. Lead counsel's assertions of strategy are not credible.

Thus, the circuit court's findings, affirmed by this Court, are unreasonable and are not based on competent, substantial evidence.

Conclusion

Based upon the foregoing arguments set forth above, Smith respectfully requests that this Court grant a rehearing to reconsider its decision denying relief herein.

Respectfully submitted this 5th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day, November 5, 2021, via electronic service to Jason Rodriguez, Assistant Attorney General, at Jason.rodriguez@myfloridalegal.com and

capapp@myfloridalegal.com, and by U. S. mail to Terry Smith, DOC no. 130985, Union Correctional Institution, P. O. Box 1000, Raiford, FL 32083.

/s/ Karin L. Moore
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted using Bookman Old Style 14-point font pursuant to Florida Rules of Appellate Procedure Rule 9.045.

/s/ Karin L. Moore
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